

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
BERNARD F. AND PAMELA W. COMBEMALE	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NO. 810503
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1986 and 1987.	:	

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Petitioners, Bernard F. and Pamela W. Combemale, Route 135, Box 315, Winthrop, Maine 04364, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1986 and 1987.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 2, 1992 at 9:15 A.M., with all briefs to be submitted by February 6, 1993. The Division of Taxation filed its brief on January 15, 1993. Petitioners did not file a brief. Petitioner Pamela W. Combemale appeared by Tenzer, Greenblatt, Fallon & Kaplan, Esqs. (Glenn A. Busch, Esq., of counsel). Petitioner Bernard F. Combemale appeared by Arthur B. Greene & Co., P.C. (Richard Guttenberg, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether petitioners timely protested a Notice of Deficiency asserting additional personal income tax liability against them for the years 1986 and 1987.

FINDINGS OF FACT

By a Notice of Deficiency dated on its face March 28, 1991, the Division of Taxation ("Division") asserted additional personal income tax due against petitioners, Bernard F. and Pamela W. Combemale, for the years 1986 and 1987 in the aggregate amount of \$151,378.70, including penalty and interest.

At the commencement of the proceedings herein, the parties stipulated and agreed that the portion of the deficiency relating to the year 1986 would be cancelled by the Division in that the Notice of Deficiency was not issued in a timely manner with respect to said year. However, the portion of the asserted deficiency pertaining to the year 1987 remains at issue. Computation sheets attached to and forming a part of the Notice of Deficiency specify that the respective amounts of tax due for 1987 (exclusive of penalty and interest) are \$25,913.20 (New York State liability) and \$12,503.66 (New York City liability).

The above-described Notice of Deficiency carries on its face certified mailing number P-001-060-409, document number 84425635 and identification number L-002407170-2.

Petitioners' address on the face of the Notice of Deficiency is listed as follows:

"Combemale - Bernard F.  
Combemale - Pamela W.  
Greene  
101 Park Ave.  
New York, NY 10178-0002"

Copies of the first page of petitioners' United States Individual Income Tax Return (Form 1040) and New York State Nonresident Income Tax Return (Form IT-203) for each of the years 1986 and 1987, as well as copies of "amended" returns for each of such years, were offered in evidence. On each of these returns, petitioners consistently list their address as follows:

"Combemale, Bernard F. and Pamela W.  
Clearview Farm, ME 04364  
C/O Arthur B. Greene  
101 Park Avenue  
NY, NY 10178"

From the documents provided in evidence, it is clear that the underlying issue in this case is whether petitioners may properly be held taxable as New York State and City residents. However, petitioners claim that neither they nor their accountant, Arthur B. Greene, received the Notice of Deficiency described hereinabove. Petitioners admit, in turn, that they did not file either a petition with the Division of Tax Appeals or a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") within 90 days of the

March 28, 1991 date appearing on the face of the Notice of Deficiency, or at any time prior to the petition filed herein (received on February 14, 1992). Thus, the preliminary jurisdictional issues of proper and timely mailing of the Notice of Deficiency, and of timely protest against such notice, are presented.

A Statement of Personal Income Tax Audit Changes dated June 26, 1990 and issued to petitioners by the Division was included among the documents attached to the petition herein. Petitioners' address on the Statement of Audit Changes is listed as follows:

"Combemale Bernard and Pamela  
Arthur B. Greene  
101 Park Ave  
New York NY 10178"

It was admitted that petitioners' representative, Mr. Greene, in fact received the Statement of Personal Income Tax Audit Changes addressed as described.

In support of its position that the Notice of Deficiency was properly mailed to petitioners at their last known address, the Division submitted an affidavit made by one Donna Biondo, Head Clerk in the Division's Case and Resource Tracking System ("CARTS") control unit. Ms. Biondo described a part of her regular duties to include supervising the mailing, by certified mail, of notices of deficiency, as well as the transfer of such notices from CARTS, where such notices are generated, to the Division's District Office Audit Bureau ("DOAB") for manual review and ultimate mailing. Ms. Biondo's affidavit explains that the CARTS control unit receives two copies of each notice plus three copies of a document entitled "Certified Record for Non-Presort Manual Mail" from the CARTS Information Systems Management section where such documents are printed. After stamping the words "Mailroom: Return listing to CARTS Control Unit" on the certified mail record, two copies of such document and one copy of the notice of deficiency are delivered to a member of the staff of the CARTS control unit for delivery to the DOAB control unit. Ms. Biondo's affidavit goes on to state:

"After the notice of deficiency has been mailed to the taxpayers, one copy of the certified record for non-presort manual mail with a United States Postal Service postmark affixed is returned to the CARTS Control Unit where it is stored in the usual course of business of the CARTS Control Unit."

Attached to Ms. Biondo's affidavit is a one-page copy of a document entitled "Certified Record for Non-Presort Manual Mail", which includes a U.S. Postal Service postmark stamp reflecting the date March 29, 1991. Ms. Biondo's affidavit states that such document "confirms that Notice of Deficiency number L-002407170 was mailed by certified mail to [petitioners herein] under certified mail number P001060409 on March 29, 1991."

The copy of the Certified Record for Non-Presort Manual Mail ("Certified Record") indicates in its upper right hand corner that it is page 6. The total number of pages in such record is not specified, nor are the preceding five pages included in evidence. The Certified Record contains, in its upper left hand corner, the typed date March 18th, 1991. However, the "18" is crossed out, and such date is hand-changed to read "29". The certified mail number, the notice number and the address information match such items as they are reflected on the face of the Notice of Deficiency. In the right hand column of the Certified Record, a postage amount of \$.52 is indicated, as is a "fee" (certified mailing fee) of \$1.00. A second certified number (P-001-060-410) is listed directly below the certified number pertaining to the notice relative to petitioners. However, other than such certified number and the \$1.00 certified mailing fee, the balance of information for such second taxpayer is redacted in order to comply with secrecy provisions under the Tax Law. The base of the Certified Record includes the stamped phrase "Mailroom: Return Listing to CARTS Control Unit." As noted, the U.S. Postal Service postmark of March 29, 1991 is stamped on the document. Finally, directly below the area where the name and address information appears are two additional lines. The first of these lines reads "Total pieces and amounts listed", to the right of which appears "2" followed by the amount \$2.00 (representing the total certified mailing fees for the documents listed on the page). Directly below this line is a second line, reading "Total pieces received at Post Office." The area immediately to the right of this line is blank.

In addition to the Biondo affidavit, the Division offered an affidavit made by one Jennifer Gable, employed as a Calculation Clerk II in the DOAB's control unit. This affidavit explains that when a Notice of Deficiency is received from the CARTS control unit, it is placed

in a window envelope, which in turn is wrapped in the two copies of the Certified Record for Non-Presort Manual Mail. These documents are thereafter delivered by a Division employee to the Division's mailroom where the envelope is sealed, metered and "delivered to a United States Post Office for mailing by certified mail."

The Division also offered an affidavit made by one Daniel D. Lafar, employed as a Principal Mail and Supply Clerk in the Division's Mail and Supply Section ("mailroom"). The Lafar affidavit provides that upon receipt by the Division's mailroom, a mailroom clerk compares the number of envelopes to the number of statutory notices listed on the certified mail record, and also compares the certified control numbers on the envelopes to the certified control numbers listed on the left side of such certified mail record. The affidavit goes on to explain that the clerk seals and affixes metered postage to the envelopes, after which another mailroom employee hand-delivers the envelopes and associated certified record to the United States Postal Service on the date indicated in the upper lefthand corner of the certified mail record, as such is hand-changed to reflect the actual date of delivery to the Post Office (see Finding of Fact "8"). The Lafar affidavit explains that upon delivery to the Post Office, a Postal employee verifies the addresses and certified control numbers on the envelopes against the addresses and certified control numbers on the mailing record, accepts the envelopes into the custody of the Postal Service and affixes a dated postmark to the certified mail record. The mailroom clerk then returns the certified mail record with its dated postmark to the mailroom where it is transferred to the CARTS control unit for storage (per the instruction "Mailroom: Return Listing to CARTS Control Unit" [see Finding of Fact "8"]).

In addition to the issue of mailing, petitioners also challenge the correctness of the address on the Notice of Deficiency. More specifically, petitioners argue that such address does not mirror their address as set forth on the tax returns, maintaining therefore that the Division failed to mail the notice to petitioners' last known address as required per Tax Law § 681(a). Petitioners go on to argue that this address flaw accounts for and supports their claim that neither they nor their appointed representative received the subject notice.

## CONCLUSIONS OF LAW

A. Tax Law § 681(a) provides as follows:

"[i]f upon examination of a taxpayer's return . . . the [Commissioner of Taxation] determines that there is a deficiency of income tax, [he] may mail a notice of deficiency to the taxpayer . . . . A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state."

Tax Law § 681(b) provides, in relevant part, that:

"[a]fter ninety days from the mailing of the notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalty stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition . . . ."

B. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request an informal conciliation conference between the taxpayer, a representative of the Division and a conciliation conferee (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 20 NYCRR 4000.5[c]). The time for filing a request for conciliation conference is determined by the time period set out in the statutory provision authorizing the assessment which, in this case, was 90 days as described hereinabove. Failure to timely file a request for conciliation conference (or a petition) bars the Division of Tax Appeals from entertaining the case.

C. It is well established that Tax Law § 681(a) "does not require actual receipt by a taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received" (Matter of Malpica, Tax Appeals Tribunal, July 19, 1990). Once a notice is deemed properly mailed, the risk of nondelivery falls to the taxpayer (Matter of Malpica, *supra*; Matter of Katz, Tax Appeals Tribunal, November 14, 1991).

D. The law is clear that where the timeliness of a petition or a request for conference is at issue, the initial burden is on the Division to demonstrate proper mailing of the notice being challenged (Matter of Katz, *supra*; Matter of Novar TV & Air Conditioning Sales & Serv., Tax Appeals Tribunal, May 23, 1991). The Division may prove the mailing by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing of the particular document in question (*id.*). As the Tax Appeals Tribunal has observed,

a properly completed Postal Service Form 3877 (which contains, inter alia, information regarding the document[s] mailed, and includes an area for signature by the Postal Service employee receiving the mailed document and the Postal Service date stamp setting forth the date of mailing) represents direct documentary evidence of the date and the fact of mailing.<sup>1</sup> However, failure to

comply precisely with the PS Form 3877 mailing procedures may not be fatal if the evidence is otherwise sufficient to prove mailing. As the Tribunal noted, "the crux of the matter is that the Division must introduce evidence showing that the notice of determination was properly delivered to the Postal Service for mailing" (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992).

E. Petitioners proceed on two bases in this matter. First, petitioners allege that the Division's evidence fails to establish that the notice was in fact mailed to petitioners on March 29, 1991 as claimed. Petitioners' second argument is that the mailing is flawed because it was not sent to petitioners' last known address. In this regard, petitioners apparently argue that either the absence of the Maine address information indicated on the face of their tax returns, and/or a mailing which includes "Greene" as opposed to "Arthur B. Greene", renders the address incorrect.

F. The evidence submitted by the Division, as detailed, establishes that the notice at issue in this proceeding was mailed to petitioners on March 29, 1991. On this score, the Division has offered proof to establish such March 29, 1991 mailing date by explaining its standardized mailing procedures, and also by showing direct documentary evidence that as a consequence of following these procedures, the particular mailing at issue was accomplished. The three affidavits detail the Division's standard handling and mailing procedures for notices of deficiency. Coupling these affidavits with the certified mail record, bearing the March 29, 1991

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<sup>1</sup>Other documents bearing a United States Postal Service postmark which indicate mailing are Form 3800 (Individual Certified Mail Receipt) and Form 3811 (Domestic Return Receipt).

Postal Service date stamp on the same page as appears the information described for petitioners (which information as described is consistent in all respects with the information carried on the face of the notice at issue), serves as direct documentary evidence confirming the March 29, 1991 date and fact of mailing (see, Matter of Novar TV & Air Conditioning Sales & Serv., supra; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992).<sup>2</sup> More specifically, the Division has introduced page 6 of the Certified Mailing Record, carrying information relative to petitioners on its face matching such information as is on the Notice of Deficiency in question, and such page bears a March 29, 1991 United States Postal Service postmark. This one-page document lists "2" as the number of articles, which is consistent with the taxpayer listings on such page (to wit, the article described for petitioners plus the article described for the other taxpayer [whose name was redacted to comply with secrecy requirements] totals two pieces of mail [two articles]). All of this information, taken together with the date stamp of the Postal Service, leads logically to the conclusion that the Postal Service received the notices shown on page 6 of the Certified Record, bearing certified numbers P-001-060-409 (pertaining to petitioners) and P-001-060-410, for mailing on March 29, 1991 (Matter of Katz, supra).

G. With regard to petitioners' second argument, the Division in this case addressed the notice in a manner sufficiently parallel to the address listed by petitioners on their returns. As the Division points out by brief, the absence of petitioners' representative's first name and middle

initial from such address, that is stating "Greene" as opposed to "Arthur B. Greene", would only

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<sup>2</sup>In this case, the Division did not use PS Form 3877, but rather used a Division computer-generated document known as a "Certified Record for Non-Presort Manual Mail." The use of such document, which contains essentially the same information as appears on PS Form 3877, does not itself preclude the Division from establishing mailing, but only deprives the Division of being able to assert a presumption of official regularity in its favor as would arise where use of and exact compliance with PS Form 3877 is shown (Matter of Air Flex Custom Furniture, supra).



be relevant upon a showing that there was more than one "Greene" or more than one Arthur B. Greene at the 101 Park Avenue address listed for petitioners. In fact, petitioners' representative admitted that a Statement of Personal Income Tax Audit Changes addressed in substantially the same manner was received by Mr. Greene (see Finding of Fact "6"). It would seem, in addition, that inclusion of the Maine address information listed on petitioners' return would only serve at best to confuse the issue of where documents were to be delivered. In fact, petitioners specified, by their manner of addressing their returns, their desire to have correspondence mailed to them care of their appointed representative at 101 Park Avenue. No other address is specified to which documents were to be mailed, and the substantial compliance by the Division with the address specified by petitioners is sufficient to meet the requirement that the notice be mailed to petitioners' "last known address" per Tax Law § 681(a) (cf., Matter of Agosto v. Tax Commn. of State of New York, 68 NY2d 891, 508 NYS2d 934; ; Matter of Rosen, Tax Appeals Tribunal, July 19, 1990; Matter of Karolight, Ltd., Tax Appeals Tribunal, July 30, 1992).

H. In view of the foregoing conclusion that the notice was properly mailed to petitioners at their last known address per Tax Law § 681(a) on March 29, 1991, and that actual receipt thereafter is not required in order for the statutory 90-day protest period to commence running (see Conclusion of Law "C"), means petitioners had to file a petition or a request for conciliation conference on or before June 27, 1991. Since petitioners admittedly did not file any such petition or request prior to the petition herein (received on February 14, 1992), the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioners' case.<sup>3</sup>

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<sup>3</sup>It should be noted that petitioners are not entirely without redress in that they can still obtain a hearing on the merits of their case by paying the tax and interest now due, filing a claim for refund within two years from the time of such payment (Tax Law § 687[a]) and thereafter (assuming the claim for refund is denied or is not acted upon within six months of the date it is filed and thus is deemed denied) filing a petition contesting such denial of refund pursuant to Tax Law § 689(c).

I. The petition of Bernard F. and Pamela W. Combemale is hereby dismissed.

DATED: Troy, New York  
July 1, 1993

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE